BANK SIMPANAN NASIONAL

v.

ABDUL MUTALIB MOHD SALLEH

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-597-2003]
18 JULY 2005

CIVIL PROCEDURE: *Appearance - Time limited for appearing - Defendant's address for service outside local jurisdiction of Court - Whether defendant given only eight days to enter appearance - Rules of the High Court 1980, O. 12 r. 4(a) - Chronology of events - Whether defendant precluded from entering appearance - Whether defendant given opportunity of retaining solicitors to demonstrate cause to the contrary*

LAND LAW: *Charge - Order for sale - Particulars to be stated in affidavits - Rules of the High Court 1980, O. 83 r. 3 - Whether plaintiff's affidavits in support specifically set out statutory particulars required - Whether there was cause to the contrary*

LAND LAW: *Charge - Order for sale - Cause to the contrary - Plaintiff's service of final affidavit on defendant - Whether failed to comply with O. 83 r. 2(4) of the Rules of the High Court 1980 - Whether adequate time given to defendant to file affidavit in reply - Whether there was injustice caused to defendant - Whether there was cause to the contrary*

This was the plaintiff's (chargee's) application by way of an originating summons for an order that the defendant's (chargor's) property ('the property') be sold in a public auction, pursuant to s. 256 of the National Land Code. The defendant herein raised a preliminary objection that the plaintiff's originating summons had failed to comply with O. 12 r. 4(a) of the Rules of the High Court 1980, as the defendant was given merely eight days to enter appearance. It was further argued for the defendant that (1) the plaintiff's affidavit had not complied with O. 83 r. 3 of the Rules of the High Court 1980 and so this had raised a cause to the contrary and (2) the plaintiff's final affidavit affirmed on 15 September 2004 was served on the defendant's solicitors on 16 September 2004 while the hearing of the originating summons had been fixed for 20 September 2004, and so had failed to comply with O. 83 r. 2(4) of the Rules of the High Court 1980.

Held (order in terms of plaintiff's application):

[1] The defendant, having an address for service in Kuala Lumpur outside the local jurisdiction of the High Court of Malaya in Seremban, was entitled to have 12 days to enter appearance under O. 12 r. 4(a). However, the chronology of events showed that notwithstanding the eight days for entry of appearance, there was no hearing on the return date and so the plaintiff had not obtained any order for sale against the defendant after the eight day period. The defendant had never been precluded from entering his appearance at all and had been given the opportunity of retaining solicitors to raise every objection in an attempt to demonstrate a cause to the contrary. The court was unable to see any merit in the defendant's preliminary objection. (p 6 a-c)

[2] The plaintiff's affidavits in support had specifically set out the statutory particulars as required under O. 83 r. 3(3), (6) and (7) and the final affidavit had also tabulated statutory particulars. Further, it was held in *Low Lee Lian* that a mere failure to give the statutory particulars did not raise a "cause to the contrary" pursuant to s. 256(3) of the National Land Code. (p 6 f-g)

[3] The intention manifested in O. 83 r. 2(4) read with O. 3 r. 2 is to allow the defendant in the instant application sufficient time to reply to the plaintiff's affidavit if the defendant is minded or inclined to do so. Here, adequate time was afforded to the defendant to file his affidavit in reply. Although the hearing of the originating summons was fixed for 20 September 2000, counsel had been given more than one month respectively to file their written submissions. During the intervening period, if the defendant had intended to file any affidavit in reply, the defendant could not have been precluded from doing so. Hence, the court was unable to see any injustice caused to the defendant in any event. The defendant had not shown cause to the contrary and thus the plaintiff was entitled to an order for sale. (pp 9 d-f & 10 b)

Case(s) referred to:

Arab-Malaysian Bank Bhd v. Lian Yit Engineering Sdn Bhd [2000] 1 CLJ 572 HC ***(refd)***

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank [2003] 3 CLJ 532 CA ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(refd)***

Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors [2003] 7 CLJ 11 HC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

Megnaway Enterprise Sdn Bhd v. Soon Lian Hock [2003] 5 CLJ 103 HC ***(refd)***
Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd [2000] 2 CLJ 73 HC ***(refd)***
OCBC Bank (M) Bhd v. Astano Electric Sdn Bhd [1999] 8 CLJ 369 HC ***(refd)***
OCBC Bank (M) Bhd v. CTK Enterprise Sdn Bhd [2000] 6 CLJ 158 HC ***(refd)***
Terrance Simon Marbeck v. Kerajaan Malaysia [2003] 6 CLJ 120 HC ***(refd)***

Legislation referred to:
National Land Code, ss. 256(3), 340(3)(a), (b), (c)
Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 3 r. 2, O. 12 rr. 4(a), 8(3), O. 83 rr. 2(4), 3(3), (6), (7)

Other source(s) referred to:
Malaysian High Court Practice, MLJ 1998 Desk edn, vol 1, p 5374

For the plaintiff - Nasharuddin Hussin; M/s Nasharuddin, YK Chew & Partners
For the defendant - Nor Haniza Saad; M/s Azam, Baba & Aqmar

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiff's (chargee's) application by way of an originating summons in enclosure (1) for an order that the defendant's ("the chargor's") property held under H.S.(D) 104050 PT No. 15914, in the mukim of Setul, district of Seremban ("the property") be sold in a public auction, pursuant to s. 256 of the National Land Code.

A reference hereinafter to a section is a reference to that section in the National Land Code, and a reference to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980, unless otherwise stated.

Factual Background

At the request of the defendant, the chargee had agreed to give and did give a housing loan in the sum of RM143,800 to the chargor, subject to the terms and conditions which the parties have agreed pursuant to the letter of offer dated 7 May 1997 and the charge registered as presentation No. 28834/97 Jilid 1349 Folio 28 ("the registered charge") with the property as security thereof.

On the chargor's subsequent default in the repayment of the housing loan, the chargee *vide* solicitors' letters dated 2 January 2002 and 25 January 2002 demanded repayment by the chargor of the outstanding sum of RM133,850.65 as at 16 January 2002, but the chargor had persisted in the default.

The chargee had through solicitors issued a notice in Form 16D dated 26 March 2002 ("the statutory notice") requiring the chargor to remedy the breach but the chargor has failed, refused and neglected to do so. Hence, this charge action by the chargee against the chargor.

Governing Principles

The principles governing charge actions have been set out with unrivalled clarity in the judgment of the then Supreme Court delivered by Gopal Sri Ram JCA in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 at 44 to 46. The then Supreme Court held that under s. 256(3), the court shall order the sale of the land to which the charge relates unless it is satisfied of the existence of cause to the contrary, which may be established by the chargor in three categories of cases *viz*:

1. the chargor comes within any of the exceptions to the indefeasibility doctrine housed in s. 340 eg, fraud or misrepresentation (under s. 340(3)(a)); forgery or insufficient or void instrument (under s. 340 (3)(b)); or unlawfully acquired title or interest (under s. 340(3)(c));

2. the chargee has failed to meet the conditions precedent for the making of an application for an order for sale eg, chargee's failure to prove the making of a demand or service upon the chargor of the statutory notice; or where the statutory notice demands sums not lawfully due from the chargor; or

3. the grant of an order for sale would be contrary to some rule of law or equity.

Order 12 r. 4(a)

Miss Nor Haniza Saad, learned counsel for the defendant, raised a preliminary objection that the plaintiff's originating summons dated 24 June 2003 has failed to comply with O. 12 r. 4(a), as the defendant whose address was in Kuala Lumpur was given merely eight days to enter appearance when it should have been 12 days, and that the plaintiff has on 7 August 2003 filed and served on the defendant the notice of appointment of hearing after the originating summons has been served on the defendant on 29 July 2003, as a result of which the notice of appointment of hearing was premature with a lapse of nine days only when it should have been 12 days. Support was sought in *OCBC Bank (M) Bhd v. Astano Electric Sdn Bhd* [1999] 8 CLJ 369.

Mr. Nasharuddin bin Hussin, learned counsel for the plaintiff, responded that the plaintiff has complied with O. 12 r. 4(a) and even if there had been non-compliance, the defendant had not been prejudiced thereby.

I am mindful of the judgment of Kamalanathan Ratnam J (as he then was) in *Astano Electric Sdn Bhd, supra,* in which the plaintiff's originating summons seeking an order for sale and affidavit in support, both dated 29 October 1998, were served on the defendant on 12 November 1998 in Petaling Jaya, when the originating summons was filed in the Kuala Lumpur High Court. It gave the defendant eight days as opposed to 12 days to enter appearance. On the basis of O. 12 r. 4(a) and O. 12 r. 8(3), the learned judge held that the defendant had succeeded in showing a cause to the contrary pursuant to s. 256(3).

It is to be observed that that judgment was delivered before the amendment to the Rules of the High Court 1980, as provided now under O. 1A and O. 2 r. 3 and also the authoritative judgment in *Low Lee Lian, supra.*

In my judgment, the issue raised for the defendant herein is highly technical in nature which has not occasioned a substantial miscarriage of justice and may be dealt with under O. 1A which came into force on 16 May 2002. O. 1A provides that in administering any of the rules herein, the court or a judge shall have regard to the justice of the case and not only to the technical non-compliance with any of the rules herein.

Under O. 2 r. 3, a court or judge shall not allow any preliminary objection by any party to any cause, matter or proceedings only on the ground of non-compliance with any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice: see also *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645 FC; *Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan* [2002] 3 CLJ 686 HC; *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock* [2003] 5 CLJ 103 HC; *Terrance Simon Marbeck v. Kerajaan Malaysia* [2003] 6 CLJ 120 HC; and *Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors* [2003] 7 CLJ 11 HC.

Be that as it may, the answer to the defendant's objection may be found by putting the chronology of events in proper perspective, as follows:

Date	Event
29 July 2003	Service of this originating summons on the defendant
10 October 2003	Defendant retained solicitors
13 October 2003	Defendant's solicitors appeared in court for the first time

While it is true that under O. 12 r. 4(a), the defendant having an address for service in Kuala Lumpur outside the local jurisdiction of the High Court of Malaya in Seremban is entitled to have 12 days to enter appearance, the chronology of events clearly shows that notwithstanding the eight days for entry of appearance, there was no hearing on the return date and so the plaintiff has not obtained any order for sale against the defendant after the 8-day period. Had the plaintiff obtained the order for sale in such circumstances, that order would have been irregular and would have been capable of being set *ex debito justitiae*. However, that was not to be the case here, as the defendant had never been precluded from entering his appearance at all. As a matter of fact, the defendant has been given the opportunity of retaining solicitors to raise every objection in an attempt to demonstrate a cause to the contrary.

In the circumstances, I am unable to see any merit in the defendant's preliminary objection.

Order 83 r. 3

The defendant argued that the plaintiff's affidavit has not complied with O. 83 r. 3 and so this has raised a cause to the contrary, deriving support from *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608.

The plaintiff's response is that the necessary particulars under O. 83 r. 3 have been included in the plaintiff's affidavits in support, citing *OCBC Bank (M) Bhd v. CTK Enterprise Sdn Bhd* [2000] 6 CLJ 158; *Arab-Malaysian Bank Bhd v. Lian Yit Engineering Sdn Bhd* [2000] 1 CLJ 572; and *Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd* [2000] 2 CLJ 73.

In my view, the answer to the above conflicting submissions is best ascertained by a meticulous examination of the plaintiff's affidavits in support, the first of which was affirmed on 24 June 2003 by one Kamarul Zaman bin Dahalan, an officer of the plaintiff wherein para 13(a) to (j) has specifically set out the statutory particulars as required under O. 83 rr. 3(3), (6) and (7), while the final affidavit affirmed by one Azahari bin Hj. Jamaluddin, also an officer of the plaintiff, on 15 September 2004 has in para 10(a) to (h) thereof tabulated these statutory particulars, as follows:

	RM
(a) Amount of advance	143,800
(b) Amount of repayments	60,088.59
(c) Amount of interest in arrears as at the date of the originating summons and the affidavit affirmed on 24 June 2003	64,291.22
(d) Amount of instalments in arrears as at 24 June 2003	64,772.47
(e) Other costs as at 24 June 2003	481.25
(e) Amount remaining due under the charge as at 24 June 2003	148,483.88
(g) Daily interest	28.48
(h) Rate of interest	7.00%

The facts before me are therefore completely different from those in *Citibank NA v. Ibrahim bin Othman, supra,* where the plaintiff has in fact failed to provide the statutory particulars, as a result of which the plaintiff's application for an order for sale was dismissed by Mahadev Shankar J (later JCA).

However, it is also significant to note that the judgment in *Ibrahim bin Othman, supra,* was not followed in *Lian Yit Engineering Sdn Bhd, supra,* where Kamalanathan Ratnam J (as he then was) had followed the more authoritative decision of the then Supreme Court in *Low Lee Lian, supra,* and held that a mere failure to give the statutory particulars did not raise a "cause to the contrary" pursuant to s. 256(3).

In *CTK Enterprise Sdn Bhd, supra,* in a similar application for an order for sale, the plaintiff's initial affidavit did not comply with O. 83 r. 3(3), but a subsequent affidavit did. PS Gill J (now FCJ) granted an order for sale, as more than one affidavit could usually be filed in this type of case because invariably the matter could not be disposed of on the first return date.

Similarly in *Diamond Agreement Sdn Bhd, supra,* Jeffrey Tan J held, *inter alia,* that the plaintiff's failure to state the "amount of the interest in arrears at the date of the affidavit" under O. 83 r. 3(3) had not prejudiced the defendant and so there was no cause to the contrary.

Order 83 r. 2(4)

The final issue raised for the defendant was that the plaintiff's final affidavit affirmed on 15 September 2004 was served on the defendant's solicitors on Thursday 16 September 2004 at 2.30pm, while the hearing of the originating summons had been fixed for 20 September 2004, and so has failed to comply with O. 83 r. 2(4).

The plaintiff argued that the affidavit has been served on the defendant's solicitors four clear days before the hearing.

In my judgment, O. 83 r. 2(4) merits reproduction as follows:

> (4) Where the hearing is adjourned, then, subject to any direction given by the Court, the plaintiff must serve the notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant **not less than 2 clear days** before the date fixed for hearing. (emphasis added)

In relation to the defendant's submission pertaining to the plaintiff's service of the affidavit on the defendant not less than two clear days before the date fixed for hearing, I am of the view that the reckoning of the period of time of "not less than 2 clear days" under O. 83 r. 2(4) is regulated by the provisions of O. 3 r. 2, which in extenso reads:

> **Reckoning periods of time (O. 3 r. 2)**
>
> (1) Any period of time fixed by these rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.
>
> (2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.
>
> (3) Where the act is required to be done within or **not less than a specified period** before a specified date, the period ends immediately before that date.
>
> (4) Where the act is required to be done a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date.
>
> (5) Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include the day before the weekly holiday, the weekly holiday or public holiday, that day shall be excluded. (emphasis added)

The reckoning may be tabulated as follows:

Date	Reckoning
Thursday 16 September 2004 Service of affidavit	Excluded (O. 3 r. 2(2))
Friday 17 September 2004	Day 1
Saturday 18 September 2004	Excluded : O. 3 r. 2(5)
Sunday 19 September 2004	Excluded : O. 3 r. 2(5)
Monday 20 September 2004 Date of hearing of the originating summons	Day 2 : O. 3 r. 2(3)

It would appear that the plaintiff has fulfilled the prescribed two clear days.

In any event, I am of the view that the intention manifested in O. 83 r. 2(4) read with O. 3 r. 2 is to allow the defendant in the instant application sufficient time to reply to the plaintiff's affidavit if the defendant is minded or inclined to do so. As a matter of fact, adequate time was afforded to the defendant to file his affidavit in reply, if any.

Although the hearing of the originating summons was fixed for 20 September 2004, counsel had been given more than one month respectively to file their written submissions. During the intervening period, if the defendant had intended to file any affidavit in reply, the defendant could not have been precluded from doing so. Hence, I am unable to see any injustice caused to the defendant in any event. The submission is again highly technical and my observation in relation to O. 1A and O. 2 r. 3 above would apply with equal force here.

In this connection it is instructive to refer to the observation of Gopal Sri Ram JCA in *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank* [2003] 3 CLJ 532 that the courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case.

Further, it is particularly useful to refer to *Malaysian High Court Practice* MLJ 1998 Desk Edn. vol. 1, where the following passage appears at p. 5374:

> O. 83 r. 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim *audi alteram partem* (hear the other side): *Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* [1996] 1 MLJ 374 at p. 381 per Edgar Joseph Jr. FCJ.

The crucial question before me is whether the defendant has been given every opportunity of being heard. The answer is obviously in the affirmative, having regard to all the above submissions presented on behalf of the defendant and all the facts and circumstances before me.

Conclusion

The inevitable conclusion is that the defendant has not shown any cause to the contrary and so the plaintiff is entitled to an order for sale. I therefore make an order in terms of this application. Under s. 257(1)(c), the total amount due to the chargee as of today is RM172,885.67 and the auction is fixed for 19 October 2005.